Supreme Court, U.S.
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NO. 06-800

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

DONALD LOUIS BOSLEY,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE STATE FAILED TO PROVE TO THE JURY ALL FACTS LEGALLY ESSENTIAL TO FIND THE DEFENDANT GUILTY BECAUSE THE ENTIRE TRIAL RECORD WAS DEVOID OF ANY EVIDENCE THAT THE DEFENDANT'S PLEA OF GUILTY WAS FREELY AND VOLUNTARILY MADE AND ALSO DEVOID OF ANY EVIDENCE THAT THE DEFENDANT WAS MENTALLY COMPETENT AND UPON SUCH A RECORD THE COURT INSTRUCTED THE JURY TO FIND THE DEFENDANT GUILTY.

II. WHETHER, WHEN THE STATE DEMANDS A JURY TRIAL ON GUILT-INNOCENCE AND THE DEFENDANT PLEADS GUILTY TO THE JURY, THE STATE IS STILL REQUIRED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO PRESENT EVIDENCE TO THE JURY ON THE FACT ISSUES OF WHETHER THE DEFENDANT IS MENTALLY COMPETENT TO ENTER A PLEA OF GUILTY AND/OR WHETHER THE DEFENDANT'S PLEA IS FREELY, VOLUNTARILY AND NTELLIGENTLY MADE IN ORDER TO SUPPORT A FINDING OF GUILT.

III. WHETHER THE REASONING IN *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004) A FEDERAL CRIMINAL COURT TRIAL, IS DIRECTLY APPLICABLE TO STATE COURT PROSECUTIONS AND PROVIDES A STATE COURT DEFENDANT WITH AN ABSOLUTE RIGHT TO HAVE ALL THE FACTS LEGALLY ESSENTIAL TO PUNISHMENT PROVED TO A JURY; AND CONSEQUENTLY WHETHER FACTUAL ISSUES INVOLVING WHETHER THE DEFENDANT ENTERED HIS PLEA OF GUILTY FREELY, VOLUNTARILY AND INTELLIGENTLY ARE LEGALLY ESSENTIAL FACTS CONCERNING WHICH THE DEFENDANT IS ENTITLED TO HAVE FINDINGS BY THE JURY.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Donald Louis Bosley

Respondent, State of Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review a final judgment of the Texas Court of Criminal Appeals entered in this action on August 30, 2006.

OPINIONS BELOW

The conviction in the trial court is not reported.

The decision of the Court of Appeals is not reported.

The decision of the Court of Criminal Appeals of Texas is not reported.

All appellate decisions are contained in the attached Appendix.

BASIS FOR JURISDICTION

The final judgment of the Texas Court of Criminal Appeals was entered on August 30, 2006. This Court has jurisdiction to review the final judgment of the Court of Criminal Appeals of Texas pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Sixth Amendment to the United States Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Applicable Portion of the Fourteenth Amendment to the United States Constitution:

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

(i) STATEMENT OF FACTS.

For ease of identification the following will be used throughout this petition:

Petitioner will be called "Bosley"

Respondent will be called "the State."

The facts in this case are:

This is an appeal from a prosecution for the second degree felony indictment alleging indecency with a child by touching. (CR page 2) The indictment set out the allegations in two counts. (CR page 2) The defense excepted to the indictment and moved to quash the indictment. (CR page 153 - 156) The court granted the defense exception (RR vol. 3 page 11 ll. 1 - 3) and thereafter the State elected to dismiss count 2 and the trial proceeded on count 1 only. (RR vol. 5 page 165 ll. 2 - 15)

The defendant repeatedly expressed his desire to waive a jury and plead guilty to the court and go to the court for

punishment. (Supp. RR vol. 1 page 5) (RR vol. 5 page 166 - 168) (RR vol. 7 page 92 - 96)

However, the State took the position that it had an absolute right to a jury trial on the issue of the defendant's guilt-innocence and that it would not waive its right to a jury trial. (Supp. RR vol. 1 page 5 and RR vol. 5 pages 166 - 168) Knowing that the defendant wished to plead guilty to the court, the State demanded a trial on guilt-innocence before a jury. (Supp. RR vol. 1 page 6 ll. 15 - 25 page 7 ll. 1 - 7)

The defendant changed his punishment election to the jury after the State refused to waive a jury on guilt-innocence (CR page 176)

Following *voir dire*, and the jury being sworn (RR vol. 7 page 157 and further instructed, (RR vol. 7 pages 158 – 164) the indictment was read, (RR vol. 7 page 165) and the defendant was arraigned before the jury and the defendant plead "guilty" to the jury (RR vol. 7 page 165)

The record was silent as to issues of voluntariness and understanding of the plea by the defendant. (see pages 6 - 9 of this brief)

The jury was instructed by the court to find the defendant guilty (CR page 224) and punishment was assessed by the jury at eighteen years TDCJ-ID. (CR page 228)

(ii) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

The case was tried to a jury on both guilt/innocence and punishment. Bosley was convicted of indecency with a child for which he received a sentence of eighteen years.

The Court of Appeals rendered its Memorandum Opinion affirming the lower court on March 9, 2006.

The Court of Criminal Appeals refused Bosley's Petition for Discretionary Review on August 30, 2006.

(iii) WHEN AND WHERE PETITIONER RAISED FEDERAL QUESTIONS:

The Petitioner's complaints regarding Question No. One, Two and Three were raised in the trial court at pre-trials, at the time the court ruled that upon the guilty plea the case would become a unitary proceeding and the punishment portion of the trial would commence and at the time of the charge conference. The constitutional issues were raised in his appeal to the Court of Appeals and thereafter in Bosley's Petition for Discretionary Review made to the Texas Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURTS HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSITUTIONAL LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS (*BOYKIN AND BLAKELY*) OF THE SUPREME COURT OF THE UNITED STATES.

II. THE PRESENT STATE OF THE LAW IN TEXAS FAILS TO APPLY AND APPRECIATE THE SIGNIFICANCE OF THE RIGHTS CONTAINED IN THE FIFTH, SIXTH

AND FOURTEENTH AMENDMENTS TO HAVE ALL FACT ISSUES PRESENTED TO THE JURY FOR DETERMINATION.

III. THE PRESENT STATE OF THE LAW IN TEXAS FAILS TO TAKE INTO CONSIDERATION THE SETTLED FEDERAL PRINCIPAL THAT THE TWO ESSENTIAL FACT ISSUES REGARDING A GUILTY PLEA REQUIRE FACTUAL PROOF THAT THE DEFENDANT'S PLEA WAS MADE VOLUNTARILY AND UNDERSTANDABLY.

ARGUMENT AND AUTHORITIES

Because of a relatively recent change in the sentencing rules under present Texas statutes, a defendant in certain cases (referred to as "3 g offenses") may receive deferred adjudication probation if he pleads guilty to the court and goes to the Court for sentencing, but if guilt-innocence is determined by a jury with a guilty verdict, then only the jury may award probation.

This distinction has taken on important implications in decisions made by Texas defendants since Texas Code of

Criminal Procedure Art. 42.12 sec. 3, particularly Art. 42.12 sec. 3g was amended.

In this case, the State sought to deprive the trial court of the right to grant probation of any kind – deferred adjudication or regular probation – by refusing to permit Bosley to plead guilty to the Court and insisting on the "State's right" to a jury trial on the issue of guilt-innocence.

Typically, in Texas, a defendant who is pleading guilty makes his plea to the court and then the defendant has the right to elect the court or the jury for punishment. The State is entitled to prove up the entire factual context of the case at the punishment hearing, so the State used to receive no advantage from the defendant pleading to the Court or to the jury and so in an exercise of typical judicial economy the defendant's plea would be made to the court, the required admonishments arising from *Boykin v. Alabama*, 395 U.S. 238 (1969) would be made by the Court and if the defendant elected the jury to assess

punishment, the case on punishment would proceed before the jury.

However, in this instance, the State insisted that a jury trial on guilt innocence be held, knowing that the defendant would plead guilty to the Court if given an opportunity to do so.

The State and the Defense argued at length throughout multiple pretrials about what procedures were required. The Defense consistently argued that if the State did not waive jury trial on guilt-innocence (which the defendant wished to waive also) that the Defense would be entitled to a jury trial on all issues necessary to support a finding of guilt and a verdict of guilty by the jury.

Procedurally, following *voir dire*, and the jury being sworn, (RR vol. 7 page 157) and further instructed (RR vol. 7 page 158- 164) the indictment was read, (RR vol. 7 page 165) and the defendant was arraigned before the jury and the defendant plead "guilty" to the jury. (RR vol. 7 page 165).

The trial court announced that the case would now be a unitary proceeding and the case would proceed directly to punishment. The Defense objected and was overruled.

The State did not call Bosley to the witness stand in spite of the fact that having plead guilty constituted a wavier of Bosley's right to silence and Bosley was immediately available to be called by the State. *Boykin v. Alabama*, 395 U.S. 238 (1969)

The State did not realize that there had been no admonishments of the defendant pursuant to Texas Code of Criminal Procedure Art. 26.13, until after the close of evidence, and the Defense began to object to the charge as lacking any evidentiary support in the *Boykin* areas.

The Court of Appeals opinion states that "the State asked Appellant's counsel several times if she wanted the court to admonish Appellant and determine if his plea was voluntary and if he was competent." The opinion further states that "Appellant's trial counsel refused to allow Appellant to take the

stand, . . ." The entirety of any discussions concerning admonishments took place at the charge conference and no where else in the record.

The entire record in this appeal is silent as to issues of voluntariness and understanding of the plea by the defendant. The only question ever asked of the defendant was "How do you plead?" The trial court never addressed the defendant during the trial, and the State never called the defendant to the stand. (The Defense did not refuse to permit the defendant to take the stand as stated by Court of Appeals. Note that no reference was made as to how such an alleged refusal was made or what was said.)

At the charge conference the proposed jury charge informed the jury that the trial court had determined that the defendant was mentally competent and had made his plea freely and voluntarily and that the plea was received by the court. (RR vol. 7 page 94) The Defense objected on the basis that there was no evidence in the record to support this language in the

charge and this language was removed from the charge leaving only the language that the trial court instructed the jury to find the defendant guilty, to which the Defense also objected and the charge went to the jury with the instruction that the trial court instructed the jury to find the defendant guilty. The trial court refused to accept Bosley's plea. (RR vol. 7 pages 101 – 105)

During the charge conference, following the close of evidence, the State suggested that the Court could conduct all the statutory admonishments contained in art. 26.13 of the Code of Crim. Pro. and make the required findings on issues of freely, voluntarily and competently. The Defense advised that if the Court were to conduct these admonishments and then accept the defendant's guilty plea that the Defense's position would be that Bosley had in effect made his plea of guilty to the court and not to the jury and the defendant would ask to change his election for punishment to the court on the basis that the plea of guilty had actually been made to the court and not to the jury.

The position of defendant's counsel was not that the defendant could not be called to the stand, and a reading of the entire record contains nothing by the Defense that can be construed as a refusal for the defendant to take the stand. The Defense is clear that if the defendant is admonished by the Court that the Defense will immediately treat such a development as the defendant having plead to the court and therefore enable the defendant to seek probation from the Court on punishment. Following this exchange, the State chose not to call Bosley to the stand or to ask the Court to admonish Bosley.

The Defense repeatedly insisted that Bosley was entitled to a jury trial on all factual issues and that these fact issues included competence and whether the plea was freely and voluntarily made by Bosley. The Defense referenced Bosley's rights under the Sixth, Fifth and Fourteenth Amendments to the United States Constitution throughout the pretrial discussion and arguments, and throughout the trial and charge conference objections.

The State did not ask to reopen the evidence in this case and the end result was that the entire record is silent on the issues of whether the defendant's plea was freely and voluntarily made and whether the defendant understood his plea or was competent to make the plea.

Because of the relatively recent change in statutory sentencing variables, the State wishes to pursue a path that limits the options of a defendant, such as Bosley, to receive probation. However, the State believes and insists that a jury trial on guilt-innocence does not add any evidentiary burdens to the State's case when the defendant pleads guilty to the jury. The State and the Texas Courts are misreading and misinterpreting the cases of *Boykin v. Alabama,* 395 U.S. 238 (1969) and the recent case of *Washington v. Blakely,* 542 U.S. 296 (2004) and the additional evidentiary requirements that arise in a situation involving a jury trial on guilt innocence with a guilty plea to the jury.

Counsel for the defendant stated that the position was

that the defendant was entitled to a full trial on all guilt-innocence issues and an entire charge on guilt-innocence (RR vol. 7 page 95) (The reporter's record in this case was filed out of order)

The Defense counsel specifically objected as follows:

> "We are combining two types of proceedings which cannot be combined. The defendant did not waive his right once the State said that they would not waive and let us go to the court with our plea of guilty. The Defendant did not waive his right, nor did the State; and, consequently, the defendant is in the process of being deprived of his 5th and 14th Amendments to due process under the United States Constitution, his Article 1 Section 19 right to due course of law under the Texas Constitution, his 14th Amendment right under the United States Constitution to equal protection, and his Article 1 Section 3 right to equal protection under the Texas Constitution.
>
> And that he's being deprived of the procedures by which either, 1, a proper plea of guilty to the Court could and should have been made, and he would gladly have done that. But that didn't happen. But, instead, that the plea of guilty to the jury is not – its – the protections of Article 26.13 that go with the court then instructing the jury to find the defendant guilty have not occurred, nor is the jury being asked to

consider guilt-innocence and be properly charged and then their making a determination as was the proper trial that the State demanded on guilt-innocence on that particular phase of this trial.

So, consequently, we do not believe and we object to the Court instructing the jury to find the defendant guilty as charged in the indictment and that this Court is without the power to so instruct, and that there should be an entire charge on guilt-innocence.

The – consequently, we also object to the – verdict which is couched in the language, we, the jury, find the defendant Donald Louis Bosley, guilty of the offense of indecency with a child. Because the jury is not being provided with the verdict forms that do anything other than prevent them – that they must find guilty on the instruction of the court, when the constitutional protections, the statutory protections have not been followed in this case."

(RR vol. 7 pages 94 - 95)

During the April 1 pre-trial the matter of the State forcing the defendant to "plead" to the jury rather than to the court, on the theory that the State had a "right" to force the defendant to have to participate in a jury trial on the matter of guilt-innocence was argued between the parties before the court.

(Supp. RR vol. 1) At the start of the jury trial the court advised the parties that the Court was "open to suggestions as to how to do it technically." (RR vol. 5 page 170 - 171) as to the proper procedures for conducting the trial to suit the State's position. The Defense declined to advise the court in this aspect of the trial. (RR vol. 5 pages 172 - 174) The State failed to appreciate that, even though the fact issues involving the defendant's guilt might be obviated by the defendant's guilty plea that fact issues remained to be proved before the trier of fact before the guilty plea, was properly in place and the jury could proceed to punishment, one of these fact issues being whether the plea is freely and voluntarily made by the defendant and another being the mental competence or understanding of the defendant to support a plea of guilty, and that an evidentiary record of these issues must be made to support the plea of guilty. *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed.2d 274 (1969)

The admonishments of C.C.P. Art. 26.13 are merely a codification to assist the court in covering the various areas of

inquiry which have been identified in supporting a plea of guilty being voluntary and understood by the defendant. *Aguirre-Mata v. State*, 125 S.W. 473 (Tex. Crim. App. 2003) The defendant having pleaded guilty to the jury and the jury being in place as the fact finder, (because the State would not waive a jury trial) the State was then in a position when the guilty plea was made by the defendant to call the defendant to the stand because by law the defendant had waived his right against self incrimination, see *Boykin v. Alabama,* 395 U.S. 238 (1969) However, the State failed to call the defendant and address any inquiries to the defendant on the record before the jury that would furnish any evidentiary basis for any conclusion being drawn on these two necessary factual evidentiary matters.

At the time of the charge conference, the prior charge had read that the Court had determined that the defendant was mentally competent and had made his plea freely and voluntarily and that the plea was received by the Court. (RR vol. 7 page 94) The defendant objected and this language was

removed from the first charge, leaving only the language that the Court instructed the jury to find the defendant guilty. (RR vol. 7 page 94) The State failed to ask for leave to reopen the evidence in the case before the jury to address the fact issues involved in voluntariness and mental competence.

At the time of the charge conference, the Court considered admonishing the defendant under C.C.P. Art. 26.13, but when the defendant objected that such admonishments were not timely, and that if the court proceeded to conduct the admonishments, that the defendant would take the position that the plea of guilty was really being made to the court and being accepted by the court and not being made to the jury, the Court decided not to admonish the defendant and not accept the defendant's plea. (RR vol. 7 page 101 - 105)

The State could have requested that the court conduct the C.C.P. Art. 26.13 admonishments, at which time the Defense would have moved that the guilty plea had been to the court and not to the jury; but the State chose not to request the

court to proceed with admonishments. (RR vol. 7 pages 101 - 105) The State failed to ask for any relief still available to it before the jury to cure the error prior to the case going to the jury.

The present Texas interpretation finds that the case immediately becomes unitary and proceeds to punishment. This interpretation fails to require the State to fulfill its evidentiary burden enunciated in the case of *Boykin v. Alabama, 395 U.S. 238 (1969)* and also fails to provide the defendant with his right to have a jury decide all of the factual issues in the case as enunciated in *Washington v. Blakely, 542 U.S. 296 (2004).*

CONCLUSION

Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Bosley was entitled to have the jury decide all fact issues necessary to support a finding of guilt before proceeding to punishment. In this case the required factual foundation set out in *Boykin, supra,* was not laid before

the jury (or before the Court). For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD LOUIS BOSLEY,

Petitioner

V.

THE STATE OF TEXAS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A. MEMORANDUM OPINION OF THE COURT OF APPEALS

B. "ORDER" OF THE TEXAS COURT OF CRIMINAL APPEALS REFUSING PETITION FOR DISCRETIONARY REVIEW

C. TEXT OF ART. 26.13 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

D. TEXT OF ART. 42.12 § 3g OF THE TEXAS CODE OF CRIMINAL PROCEDURE

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-04-337-CR

DONALD LOUIS BOSLEY APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 89TH DISTRICT COURT OF WICHITA COUNTY

MEMORANDUM OPINION[1]

Upon his plea of guilty, a jury convicted Appellant Donald Louis Bosley of indecency with a child by contact and assessed his punishment at eighteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. The trial court sentenced him accordingly. Appellant brings three points, challenging the trial procedure and alleging possible prosecutorial misconduct. Because we hold that the trial court did not err, we affirm the trial court's judgment.

Appellant was indicted for indecency with a child. On July 10, 2003, Appellant filed a waiver of arraignment and entered a plea of not guilty. At a pretrial hearing on April 1, 2004, Appellant advised the trial court that he intended to waive

a jury trial and plead guilty before the court so that he could request the court to place him on deferred adjudication. The State advised the court and Appellant that it did not intend to waive its right to a jury trial. At a later pretrial hearing on April 8, 2004, Appellant would not advise the court whether he planned on pleading guilty or not guilty.

The case was called to trial on April 20, 2004. The jury was empaneled, the indictment was read, and Appellant pled guilty. Appellant had filed an election to have the jury assess punishment. The trial court announced to the jury that the trial was to be a unitary proceeding, and Appellant objected, asserting that he was entitled to a bifurcated trial.

During the trial, the State asked Appellant's counsel several times if she wanted the court to admonish Appellant and determine if his plea was voluntary and if he was competent. Appellant's trial counsel refused to allow Appellant to take the stand, claiming that Appellant's taking the stand would be equivalent to the State waiving its right to a jury trial and that Appellant would then elect to have the court assess punishment.

Appellant also asserts that the State made improper remarks and lodged person attacks on his trial counsel during the trial. After both sides had rested, Appellant again objected that he was entitled to a bifurcated trial.

The jury charge, in part, instructed the jury that, because Appellant had pled guilty, the jury was to find him guilty. Appellant objected to the jury charge, arguing that, because the State had refused to allow Appellant to waive the jury trial, the trial court could not instruct the jury to find him guilty. The trial court overruled the objection. After the trial court pronounced his sentence, Appellant timely appealed.

In his first point, Appellant argues that the State failed to present evidence to the jury to prove that Appellant's plea of guilty was freely and voluntarily made and that Appellant was mentally competent to enter his guilty plea. The trial court, not the State, admonishes the defendant about the consequences of his plea of guilty.[2] The admonishments occur outside the presence of the jury.[3] There is no requirement that a defendant in a criminal case enter his plea of guilty before the jury.[4] It is the trial court, not the jury, that accepts a defendant's plea of guilty.[5] The jury is not required to determine whether the plea is freely and voluntarily entered or whether a defendant is mentally competent to stand trial; the trial court is.[6] Consequently, there is no requirement that any evidence of these matters be presented to the jury. We overrule Appellant's first point.

In his second point, Appellant argues that he was denied his Sixth Amendment right to require the State to prove to a jury all facts legally essential to find him guilty and thereafter assess his punishment when the trial court instructed the fury to find the defendant guilty and proceed to determine punishment. A guilty plea in a jury trial admits the existence of all incriminating facts necessary to establish the guilt of the defendant.[7] There is, therefore, no issue in controversy regarding guilt,[8] and an instructed verdict on guilt is a proper verdict.[9] The only issue before the jury is punishment.[10] After a guilty plea has been entered in a jury trial, a unitary procedure, not a bifurcated procedure, is to be used.[11] We overrule Appellant's second point.

In his third point, Appellant argues that the State engaged in two instances of prosecutorial misconduct by making personal attacks on Appellant's counsel. In one instance, Appellant did not obtain a ruling. In the other,

Appellant did not object. Appellant has therefore failed to preserve this complaint for our review.[12] We overrule Appellant's third point.

Having overruled Appellant's three points, we affirm the trial court's judgment.

LEE ANN DAUPHINOT
JUSTICE

PANEL A: DAUPHINOT, WALKER, AND MCCOY, JJ.

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)

DELIVERED: March 9, 2006

[1]*See* TEX. R. APP. P. 47.4.

[2]See TEX. CODE CRIM. PROC. ANN. Art. 26.13 (a) (Vernon Supp. 2005)

[3]*Palacios v. State*, 556 S.W.2d 349, 351-52 (Tex. Crim. App. 1977)

[4]*Tutor v. State*, 599 S.W.2d 818, 820 (Tex. Crim. App. 1980).

[5]*See* Tex. Code Crim. Proc. Ann. Art. 26.13

[6]See *id.* Art. 26.13(b)

[7]*Ricondo v. State*, 634 S.W.2d 837, 841 (Tex. Crim. App. 1982) (op. on reh'g).

[8]See *Fairfield v. State*, 610 S.W.2d 771, 776-77 (Tex. Crim. App. 1981).

[9]*Holland v. State*, 761 S.W.2d 307, 312 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1091 (1989)

[10]*Ricondo*, 634 S.W.2d at 841; *Fairfield*, 610 S.W.2d at 777; see Tex. Code Crim. Proc. Ann. Art. 26.14 (Vernon Supp. 2005); *Holland*, 761 S.W.2d at 312.

[11]*Basaldua v. State*, 481 S.W.2d 851, 853 (Tex. Crim. App. 1972); *See* Tex. Code Crim. Proc. Ann. Arts. 26.14, 27.13 (Vernon 1989 & Supp. 2005)

[12]*See* Tex. R. App. P. 33.1(a); *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004); *Mosley v. State*, 983 S.W.2d 249, 265 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied*, 526 U.S. 1070 (1999)

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

Wednesday, August 30, 2006
Re: Case No. PD-0513-06
COA#: 02-04-00337-CR
STYLE: BOSLEY, DONALD LOUIS

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

Art. 26.13 CODE CRIM. P. [501] [565] [554] Plea of guilty

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

(1) the range of the punishment attached to the offense;

(2) the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court. Provided that the court shall inquire as to the existence of any plea bargaining agreements between the state and the defendant and, in the event that such an agreement exists, the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea. Should the court reject any such agreement, the defendant shall be permitted to withdraw his plea of guilty or nolo contendere;

(3) the fact that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the trial court must give its permission to the defendant before he may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial;

(4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law; and

(5) the fact that the defendant will be required to meet the registration requirements of Chapter 62, if the defendant is

convicted of or placed on deferred adjudication for an offense for which a person is subject to registration under that chapter.

(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.

(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

(d) The court may make the admonitions required by this article either orally or in writing. If the court makes the admonitions in writing, it must receive a statement signed by the defendant and the defendant's attorney that he understands the admonitions and is aware of the consequences of his plea. If the defendant is unable or refuses to sign the statement, the court shall make the admonitions orally.

(e) Before accepting a plea of guilty or a plea of nolo contendere, the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.

(f) The court must substantially comply with Subsection (e) of this article. The failure of the court to comply with Subsection (e) of this article is not grounds for the defendant to set aside the conviction, sentence, or plea.

(g) Before accepting a plea of guilty or a plea of nolo contendere and on the request of a victim of the offense, the

court may assist the victim and the defendant in participating in a victim-offender mediation program.

(h) The court must substantially comply with Subsection (a)(5). The failure of the court to comply with Subsection (a)(5) is not a ground for the defendant to set aside the conviction, sentence, or plea.

(i) Notwithstanding this article, a court shall not order the state or any of its prosecuting attorneys to participate in mediation, dispute resolution, arbitration, or other similar procedures in relation to a criminal prosecution unless upon written consent of the state.

Art. 42.12 Judge Ordered Community Supervision

Sec. 3. (a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere, may suspend the imposition of the sentence and place the defendant on community supervision or impose a fine applicable to the offense and place the defendant on community supervision.

(b) Except as provided by Subsection (f), in a felony case the minimum period of community supervision is the same as the minimum term of imprisonment applicable to the offense and the maximum period of community supervision is 10 years.

(c) The maximum period of community supervision in a misdemeanor case is two years.

(d) A judge may increase the maximum period of community supervision in the manner provided by Section 22 (c) or 22A of the article.

(e) A defendant is not eligible for community supervision under this section if the defendant:

(1) is sentenced to a term of imprisonment that exceeds 10 years; or

(2) is sentenced to serve a term of confinement under Section 12.35, Penal Code.

(f) The minimum period of community supervision for a felony described by Section 13B(b) is five years and the maximum period of supervision is 10 years.

(g) A judge shall not deny community supervision to a defendant based solely on the defendant's inability to speak, read, write, hear, or understand English.

Secs. 3a to 3f. [Blank].

Limitation on Judge Ordered Community Supervision

Sec. 3g. (a) The provisions of Section 3 of this article no not apply:

(1) to a defendant adjudged guilty of an offense under:

(A) Section 19.02, Penal Code (Murder);

(B) Section 19.03, Penal Code (Capital Murder);

(C) Section 21.11 (a) (1), Penal Code (Indecency with a child)

(D) Section 20.04, Penal Code (Aggravated kidnapping);

(E) Section 22.021, Penal Code (Aggravated sexual assault);

(F) Section 29.03, Penal Code (Aggravated robbery)

(G) Chapter 481, Health and Safety Code, for which punishment is increased under:

(i) Section 481.140, Health and Safety Code; or

(ii) Section 481.134(e), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any of those subsections; or

(H) Section 22.011, Penal code (Sexual assault); or

(2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. On an affirmative finding under this subdivision, the trial court shall enter the finding in the judgment of the court. On an affirmative that the deadly weapon was a firearm, the court shall enter that finding in its judgment.

(b) If there is an affirmative finding under Subsection (a) (2) in the trial of a felony of the second degree or higher that the deadly weapon used or exhibited was a firearm and the defendant is granted community supervision, the court may order the defendant confined in the institutional division of the Texas Department of Criminal Justice for not less than 60 and not more than 120 days. At any time after the defendant has served 60 days in the custody of the institutional division, the sentencing judge, on his own motion or on motion of the defendant, may order the defendant released to community supervision. The institutional division shall release the defendant to community supervision after he has served 120 days.